

Canadian Radio-television and
Telecommunications CommissionConseil de la radiodiffusion et
des télécommunications canadiennes

Canada



Letter

24 April 1995

Mr. Marc Rochon
Deputy Minister
Canadian Heritage
25 Eddy Street
Hull, Quebec
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Dear Mr. Rochon:

The Commission, on Friday, 21 April 1995 at 10:30 a.m., received by hand and subsequently by telecopier, your letter dated 20 April 1995, on behalf of the Minister of Canadian Heritage, requesting any comments or concerns related to the proposed Orders-in-Council (Orders) enclosed, by 11:00 a.m. Monday, 24 April 1995. Your letter also indicates that these proposed Orders are scheduled to be tabled in Parliament on Monday, 24 April 1995.

To begin, the Commission would like to reiterate its support of the right, responsibility and authority of the Governor in Council to "issue policy directions of general application on broad policy matters" in conformity with the *Broadcasting Act* (the Act). Nevertheless, you will no doubt understand the Commission's concern that such policy directions, in order not to undermine the integrity of its quasi-judicial, independent and public regulatory processes, should be restricted to "broad policy" terms and should be confined to matters relating to the objectives of the broadcasting policy and the regulatory policy set out in subsections 3(1) and 5(1) of the Act.

Following a careful review of the proposed Orders, the Commission is concerned that, as proposed, these Orders are too specific and narrow, instead of general and broad as contemplated under the Act. The Commission views the Governor in Council's authority under subsection 7(1) of the Act as intending to provide the Government with the ability to elaborate and interpret the policies found in subsections 3(1) and 5(1) of the Act. They were not meant, in the Commission's opinion, to allow the Government to direct it as to how to implement these policies, or to effectively create a licensing decision.

The Commission notes that certain provisions of the proposed Orders, for instance the carriage rules for DTH satellite distribution undertakings, would likely be considered as the Government's attempt to micro-manage the licensing process and, accordingly, could be interpreted as directing the Commission on how to implement broadcasting and regulatory policy and, consequently, could be subject to legal challenge.

The Commission also questions the need for the proposed Order concerning the licensing of DTH Pay-per-View (PPV) programming undertakings. It should be noted that the Commission has already licensed pay-per-view programming undertakings, and it is unable to determine, in the short time given, whether the creation of a separate class of DTH/PPV programming undertakings would be required for the licensing of competitive DTH/PPV programming undertakings.

Furthermore, the Commission is of the opinion that the proposed direction, which would, upon issuance of the Orders, terminate the presently valid authorization to operate an exempt DTH distribution undertaking, could result in a legal challenge. Such a direction would subject the consortium presently

proceeding under this authorization to retroactive regulation, something that is not specifically provided for under the Act. That consortium, in reliance on the continued existence of the Commission's exemption order, has taken steps, including reportedly the incurring of significant investments and the entering into of contractual arrangements, in order to launch a DTH distribution undertaking starting 1 September 1995. Accordingly, in order to promote consistency and continuity in the regulation of the fields of communications and business, the Commission is of the view that its exemption order should continue until services through licensed DTH distribution undertakings become available.

In response to your request for consultation in the policy direction process, and in order to ensure the proper exercise of this authority, the Commission believes that the Governor in Council's policy direction regarding DTH distribution undertakings should be limited to stating broad policy principles such as the following:

- DTH distribution undertakings should be operated in a manner that fosters fair competition and increased reliance on market forces in the provision of services; as well, these undertakings should meet the conditions of this policy, contribute to the policy objectives and regulatory policy of the Act and demonstrate benefits to the Canadian broadcasting system;
- DTH distribution undertakings should make equitable and appropriate contributions to the production and distribution of and access to Canadian cultural-content products and services while providing Canadian alternatives to non-Canadian services;
- DTH distribution undertakings must transmit all Canadian programming services destined for the Canadian market using Canadian satellite facilities, save and except for the programming of DTH/PPV programming undertakings. Authorized non-Canadian programming services destined for the Canadian market may be transmitted using non-Canadian satellite facilities. For licensed Canadian DTH/PPV programming undertakings, all Canadian programming destined for the Canadian market must be transmitted using Canadian satellite facilities, while authorized non-Canadian programming destined for the Canadian market may be transmitted using non-Canadian satellite facilities. For greater clarity, the licensee must only use Canadian satellite facilities to transmit all Canadian feature films and special or other event programming available from a DTH/PPV programming undertaking destined for the Canadian market. Any authorized non-Canadian feature films or other non-Canadian special or other event programming available from a DTH/PPV programming undertaking destined for the Canadian market may be distributed using non-Canadian satellite facilities; and-
- Following the issuance of the Governor in Council's Order, and upon completion of the licensing process to authorize any person to carry on a DTH distribution undertaking, no person should be authorized to carry on a DTH distribution undertaking by any means other than a licence.

The Commission places special emphasis on the policy direction concerning the use of Canadian satellite facilities for the transmission of Canadian programming services to Canadians, and most importantly the transmission of a Canadian DTH/PPV service to Canadians. The Commission is of the view that it is essential that the Government clarify in its policy direction its policy regarding the use of Canadian satellite facilities for the transmission of Canadian programming services, and most importantly for the transmission of a Canadian DTH/PPV service to Canadians.

In addition, the Commission would like to underline that in establishing the existing competitive regulatory framework for DTH distribution undertakings, the Commission stated on 3 June 1993 (Public Notice, CRTC 1993-74):

...that the emergence of a strong Canadian DTH industry may provide a degree of price competition to services delivered within Canada by other distribution technologies, and will form an effective part of the overall response by the Canadian broadcasting system to non-Canadian DBS services.

Subsequently, on 2 March 1994 (Public Notice, 1994-19), the Commission stated that those Canadian DTH distribution undertakings that do not meet the exemption criteria would be required to apply for a licence to operate in Canada. To date, no person or group has filed such an application.

Finally, on the matter of the type of consultation contemplated under the Act, the Commission considers that the Governor in Council, bearing in mind the complexity of the issue, must provide it with a reasonable period of time to convene a quorum of Commissioners, before expecting a response. Nevertheless, the Commission hopes that its comments, which are its best attempt to assist the Government in the short deadline given, will provide the Governor in Council with useful and valuable advice when it undertakes for the first time to issue policy directions to the Commission under section 7 of the Act.

Yours sincerely,

Allan J. Darling

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